91-861

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-

MIKE TODD, ... Petitioner

v.

CAREY SMITH, individually and in his official capacity as former City Manager of the City of Myrtle Beach, South Carolina, MACK STONE, individually and in his official capacity as former Director of the Myrtle Beach Convention Center, and the CITY OF MYRTLE BEACH, South Carolina, a municipal corporation . . . . . Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

APPENDIX

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STATE OF SOUTH CAROLINA
In the Supreme Court

MIKE TODD, ...Appellant,

v.

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Appeal from Horry County
James E. Moore, Judge

Opinion No. 23452
Heard November 27, 1991
Filed August 5, 1991
Rehearing Denied Sept. 4, 1991.

O. Fayrell Furr, Jr. and W. Lamar Platt, Myrtle Beach, and Ronald M. Childress, Columbia, for appellant.

Michael W. Battle, Conway, for respondents.

Edmund H. Robinson, of Shimel, Ackerman, Theos, Spar and Robinson, Charleston, for amicus curiae, American Civil Liberties Union of South Carolina.

LITTLEJOHN, Acting Associate Justice:

At issue in this appeal is whether the trial judge erred in ruling that the city of Myrtle Beach and/or its agents are not liable for damages alleged to have arisen by reason of their requiring the removal of Plaintiff-Appellant's art work from the convention center operated by the City of Myrtle Beach. The trial judge granted the Defendants-Respondents' summary judgment holding that none were liable. We affirm.

FACTS

Plaintiff-Appellant Mike Todd was a member of the Waccamaw Arts and Crafts Guild (Guild) in November of 1982. The Guild members, through a series of agreements, were permitted by the City of Myrtle Beach to conduct art exhibits in the inner lobby of the Myrtle Beach Convention Center (Convention Center). The inner lobby is a wide hall through

which all persons attending functions at the Convention Center must pass in order to reach the main auditorium. The City agreed to allow the Guild to self-police its displays and act as a self-censor, taking no role in such itself.

On November 7, 1982, Todd displayed an exhibition of his art work in the inner lobby. The exhibition consisted of thirty-one (31) paintings and six (6) sculptures. Before the exhibition, the works were reviewed by a representative of a screening committee appointed by the Guild, and found unobjectionable. On the evening of November 7th, Jane Charles, then President of the Guild, approached Todd and requested that he remove one of the paintings, entitled "Narcissus or

Twentieth Century Mondonna," [1] because she found it offensive.

Todd refused to remove the painting. Thereafter, negotiations ensued between Todd, the Guild, and Mack Stone, Director of the Convention Center. Discussions were had on the possibility that the painting could be displayed separately in an office or covered and uncovered only for those wishing to view it. These negotiations fell through when the City refused to agree that no other paintings would berequired to be removed from the exhibit. Thereafter, Defendant Carey Smith, the City of Myrtle Beach Manager, instructed Mack Stone to close the inner lobby of the Convention Center until the matter was resolved.

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[1]. This painting is of a nude woman with one hand on her right breast and the other hand apparently fondling herself.

On November 9th, the Convention Center was open to the public solely for the purpose of entering the Convention Center auditorium. In addition, the entire exhibit was screened from the public by cloth partitions.

On November 11, 1982, Todd petitioned the circuit court for relief, alleging the Defendants had censored his art exhibition without due process of law. The petition sought an injunction restraining the Defendants from further interfering with Todd's exhibition, additional exhibition time, and money damages for lost profits and harm to Todd's reputation and occupation as an artist. The circuit court, after a hearing, issued a temporary injunction against the Defendants to preserve the status quo. The temporary injunction

was granted on the basis that Todd had been deprived of procedural due process since obscenity procedures were not followed by the City when display of the painting was prohibited.

Todd reopened his exhibition pursuant to the temporary injunction order. Thereafter, Todd removed his exhibit because the inner lobby was being used as a display area for a previously scheduled blue grass music convention and Todd did not feel his exhibit was properly protected.

Todd then brought this action against the City of Myrtle Beach, Mack Stone, individually and in his official capacity as former Director of the Convention Center and Carey Smith, individually and in his official capacity as former City Manager pursuant to Federal Statute 42

U.S.C. s 1983 alleging a violation of his civil rights secured by the First and Fourteenth Amendments to the United States Constitution. The circuit court granted summary judgment in favor of all Defendants. This appeal challenges the court's ruling as to each of the Defendants.

LAW/ANALYSIS

The order of the circuit court correctly cites and relies upon the case of Monell v. The Department of Social Services cited infra. The testimony upon which the Plaintiff-Appellant would rely simply does not create a genuine issue of fact for trial on the merits. Patently, the action of the City Manager and/or the Director of the Convention Center does not represent official municipal policy. We approve of the trial judge's treatment of

the liability issue wherein the order states:

> Action against municipal defendants under Section 1983 were authorized by the landmark decision of the Supreme Court in Monell v. Dept. of Social Services, 436 U.S. 658 (1978). In Monell, the court held that when a municipal policy of some nature is the cause of unconstitutional actions taken by municipal employees, the municipality itself will be liable. Liability will exist where the constitutional action 'implements or executes a policy, statement, ordinance, regulation or decision

officially adopted and promulgated by municipal officers, or where the constitutional deprivation is visited pursuant to governmental custom even though such a custom has not received formal approval.' The court defined 'custom' with reference to Adickes v. S.H. Kress and Co., 398 U.S. 144(1970), as 'persistent in wide spread discriminatory practices of officials.' A policy or custom need not be made by the city's lawmakers, but can be set by those whose edicts which may fairly be said to represent official policy. In the present case, the City of Myrtle Beach

has elected to adopt the council/manager form of government. In the council/ manager form of city government all legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote. Section 5-13-30, Code of Laws of South Carolina, 1976. Under the form of government adopted by the City of Myrtle Beach, the city manager and the director of the Myrtle Beach Convention Center do not have the authority to set city policy, nor can their acts be said to represent official

policy in view of the legislative authority granted to the municipal council.

The acts of Defendants Carey Smith and Mack Stone were individual discretionary acts, involving a decision on how to handle a situation which has arisen in the Myrtle Beach Convention Center only once in the entire history of Myrtle Beach. The municipal council never met, nor did they vote, on the decision made by Defendants Smith and Stone. For that reason, the acts of Defendants Smith and Stone cannot be translated as the acts of the city council or the City of Myrtle Beach. The city council

does not have the authority to delegate matters of policy of customs, and in this instance it did not delegate that authority to Carey Smith or Mack Stone, therefore the individual decisions of Defendants Smith and Stone do not give rise to liability for the City of Myrtle Beach under 42 U.S., Section 1983. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

The most that can be said favorably to Plaintiff's contention that the city established a policy is that some discussion was held informally and individually with some members of council. Under the showing made in this case, we refuse to hold that it was the duty of council members to call a meeting and

repudiate the actions of either the city manager or the director of the convention center. No policy was promulgated.

As to Defendants Smith and Stone, the trial judge correctly ruled that they enjoyed qualified immunity from suit by reason of Harlow v. Fitzgerald, 457 U.S. 800 (1982).

AFFIRMED.

GREGORY, C.J., and HARWELL, J., concur.

TOAL, J., dissenting in separate opinion.

CHANDLER, J., concurring, in result, with the dissent.

TOAL, Justice (dissenting):

I respectfully dissent. I would reverse the trial court's grant of summary judgment to the City of Myrtle Beach and affirm the grant of summary judgment to Smith, the City Manager, and Stone, the Convention Center Director.

The defendants concede at the outset that the painting is not obscene, and was not determined to be so when Todd was told to close his exhibit or remove the painting. Yet, speech need not be adjudged obscene to be regulated. Before determining whether Todd's painting was permissibly regulated, however, other thresholds should be crossed.

In Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court held for the first time that a municipality is a "person" subject to liability under Section 1983 for violating another's federally protected rights. To state a cause of action against a municipality under Section 1983, a plaintiff is required to plead three elements: (1) an official policy or

custom (2) that causes the plaintiff to be subjected to (3) a denial of a constitutional right. Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (Ct.App.1985). A municipality may only be held liable under Section 1983 if the action complained of was taken pursuant to official policy. Also, the municipal policy must be the "moving force of the constitutional violation." Polk C. v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981). Thus:

> a local government may not be sued under s 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts

> may fairly be said to represent official policy, inflicts the injury the government as an entity is responsible under § 1983.

Monell, supra, 436 U.S. at 694, 98 S.Ct. at 2037-38.

Todd contends the acts of Carey Smith and Mack Stone represent official policy and thus give rise to liability for the City of Myrtle Beach. The circuit court ruled that Smith and Stone lacked authority to set City policy, since the City had adopted the council/manager form of government in which the determination of policy is vested in the City Council. On this ground, he ruled Todd's 1983 action must fail. I disagree.

Under Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d

452 (1986), it is clear that municipal liability may be imposed for a single decision by municipal policy makers under appropriate circumstances. Further, in Moore v. City of Columbia, our Court of Appeals stated:

> The policy need not be one officially adopted and promulgated by the municipality's officials....
>
> The de facto policies of a municipality may be established in several ways. They may be established by the omissions of a municipality or supervisory officials where their unreasonable failure to make rules causes the unconstitutional conduct practiced by their employees.

> Such omissions are actionable, however, only if they constitute "tacit authorization" of or "deliberate indifference" to constitutional violations.

284 S.C. at 284, 326 S.E.2d at 160-161. (citations omitted).

In my opinion, the evidence presented before the lower court appears to indicate this standard was satisfied by Todd, as is demonstrated by the following transcript excerpt:[2]

Q. Was this decision made by you and Mr. Stone?

A. Yes.

....

Q. So this decision was made by you? He was carrying out your order to close

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[2]. This excerpt involves the decision made by City Manager Carey Smith to close Todd's exhibit.

down the show?

A. Yes.

....

Q. Did you clear this with the city?

A. Well, what do you mean by "clear"?

Q. Well, did you ask them for their input and their thoughts on what should be done?

A. Yes.

Q. And who did you talk to?

A. I did discuss it with them in general terms. Of course, by that time, there was a lot of publiciy in the newspapers and the radio and the television and that sort of thing. So they were generally aware of what had happened. We basically, my recollection is, talked to them individually and told them what we were going to do, what we

thought was best to do in the situation.

Q. Did they concur with that?

A. No one really said--and, of course, the council would have had to have acted as a body to have told me, you know, "Don't do this." And if they had done that as a body, then I would not have done it. But they did not give me any such instructions.

Q. Did you talk with Mayor Ficken?

A. I'm sure that I did, yes.

Q. He concurred that it should be removed or closed down?

A. I don't recollect, you know, his specific reaction. What I do recollect, though, is that I was not given any instruction. The council was aware of what we were going to do and we were not given any instruction to the contrary as to not to do what we planned. (Tr.

118-120). I would find the above excerpts from the record sufficient, were they to consist of the sole evidence on the issue, to demonstrate a "policy" of the City of Myrtle Beach creating liability.

"A municipal governing body may not avoid attribution of policy to itself simply by officially retaining unexercised ultimate authority to countermand a policy or to discipline or discharge the policymaker." Spell v. McDaniel, 824 F.2d 1380 (4th Cir.1987). "If a higher official has the power to overrule a decision but as a practical matter never does so, the decisionmaker may represent the effective final authority on that question." Bowen v. Watkins, 669 F.2d 979 (5th Cir.1982). Here, while the City did not implement in a formal manner its policy of excluding offensive but

non-obscene speech from the inner lobby of the Convention Center, it, on the record before this Court, appears to have done so through the use of lesse agents of the City, viz., Smith and Stone, and through its acquiescence in their actions and decisions.

However, the lower court's ruling would still be upheld if no violation of Todd's constitutional rights took place. The City argues it is free to regulate speech on its own property in a manner it chooses. The City rightly concedes that traditional areas of public assembly and debate such as streets and parks are public forums in which the State may not, due to First Amendment protections, prohibit all communicative activity. It argues the inner lobby is not a public forum.

In a traditional public forum such as a street or park:

> [f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (citations omitted). As for other public

property, it is true that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 129, 101 S.Ct. 2676, 2684, 69 L.Ed.2d 517 (1981). However, where the State (or City) designates public property for expressive activity, the respective First Amendment rights of the State and individual change.

When the State has opened public property as a place for expressive activity:

> [t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to

> create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling State interest.

Perry, supra, 460 U.S. at 45, 46, 103 S.Ct. at 955. Furthermore, a limited public forum may be designated by the State for use by certain groups or for the discussion of certain subjects. Perry, supra, 460 U.S. at 46, n. 7, 103

S.Ct. at 955 n. 7. See also Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

Myrtle Beach argues it has not designated the inner lobby of the Convention Center as even a limited public forum because it has always maintained control of the kind of expression allowed into the inner lobby. On the record, I must disagree. The record reflects Myrtle Beach allowed the Guild to police itself and took no part whatsoever in restricting, regulating, or screening speech. The Guild members in charge could just as easily have asked Todd to exhibit more works like "Narcissus" as it could have asked him to remove the painting, and Myrtle Beach's policy was to simply trust the Guild. This amounts to an abdication of any restrictions in my view, and I

would hold that Myrtle Beach designated a limited public forum in the inner lobby for Guild members who express themselves through art.

Having found a limited public forum to exist, and in light of the obvious fact that Todd's painting was restricted because of its content, I would proceed to apply the test articulated in Perry, supra, viz.: was the restriction of Todd's speech (i.e., his painting) "narrowly drawn to effectuate a compelling State interest"? First, I address whether the City has shown a compelling interest warranting the speech restriction. The United States Supreme Court has recognized a compelling State interest in protecting minors from exposure to vulgar and offensive spoken language. FCC v. Pacifica Found., 438 U.S. 726, 98 S.Ct.

3026, 57 L.Ed.2d 1073 (1978). The Court has also recognized that children may be protected from sexually explicit speech in the context of a school environment.[3] Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). The record here reflects the City was concerned with the fact that children might be exposed to the "Narcissus" painting. Even assuming this constitutes a compelling state interest, however, I would hold the City did not "narrowly tailor" its restriction of Todd's speech. The City should have adopted a less draconian remedy for its concerns than forcing Todd to remove the painting or close his exhibit. I am far from satisfied with the City's excuse that

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[3]. The Fraser case involved a so-called "captive-audience" of children, however - - a fact not present here.

"negotiations fell through" concerning alternative methods of restricting Todd's exhibit. The City must demonstrate that it offered various measures, such as placing "Narcissus" in a separate area for adult viewers, that Todd could have taken and which he unreasonably refused; or the City must clearly demonstrate why those other measures were not feasible. The City utterly failed on this point.

Hence, I would hold that the record indicates the city has, pursuant to a "policy", infringed upon Todd's First Amendment rights. I would therefore reverse the lower court's granting of summary judgment for Myrtle Beach. However, Todd did not seek summary judgment on this basis.[4] Thus, I would

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[4]. Todd moved for summary judgment on the sole ground that an earlier temporary restraining order operated as

remand this case for further proceedings regarding the defendant Myrtle Beach. If Todd moved for summary judgment on this ground, the City would of course be then free to place any additional evidence it has before the lower court to negate what, on the record before this Court, appears to be a de facto "policy" of the City.

As for the defendants Carey Smith and Mack Stone, I would affirm the lower court's ruling that they enjoy qualified immunity from suit by virtue of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In Harlow, the United States Supreme Court held:

> government officials performing discretionary functions generally are shielded from

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collateral estoppel against the City. I reject this argument.

> liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., 457 U.S. at 818, 102 S.Ct. at 2738. Because this case presents a close question as to whether, inter alia, the inner lobby constitutes a "public forum", I would hold that Stone and Mack are immune for their actions here under the Harlow decision.[5]

CHANDLER, J., concurring, in result, with the dissent, in separate opinion.

CHANDLER, Justice, (concurring, in

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[5]. Harlow qualified immunity is reserved for government officials, and may not be asserted by the City of Myrtle Beach. See Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989); Bovey v. City of Lafayette, 586 F. Supp. 1460 (N.D. Ind. 1984).

result, with the dissent):

I agree that summary judgment was improperly entered in favor of Defendant City of Myrtle Beach, but express no opinion as to whether, on the record before us, Appellant Todd is entitled to summary judgment against the City.

ORDER OF JUDGE JAMES E. MOORE OF SOUTH CAROLINA COURT OF COMMON PLEAS OF JULY 21, 1989

This matter is before me upon Motions for Summary Judgment by the Plaintiff against the Defendants, and by the Defendants against the Plaintiff. A hearing was held in the matter and oral arguments were presented by O. Fayrell Furr and Lamar Flatt, attorneys for the Plaintiff, and Michael W. Battle, attorney for the Defendants. In addition to oral arguments, the depositions of the parties, various affidavits and exhibits were presented to the Court for consideration.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a

matter of law. Rule 56(c), S. C. Rules of Civ. Procedure. No genuine issues on material facts of liability exist in this case. After considering the facts and the statutory and case law applicable to the facts, I find and conclude that the Plaintiff's Motion for Summary Judgment should be denied, and the Defendant's Motion for Summary Judgment should be granted.

Plaintiff's claim against Defendants arises under the federal statute 42 U.S.C. 1983 and alleges a violation of the Plaintiff's civil rights secured by the First and Fourteenth Amendments to the U. S. Constitution. Plaintiff was a member of the Waccamaw Arts and Crafts Guild in November of 1982. The Waccamaw Arts and Crafts Guild, through a series of agreements, was permitted to show art

exhibits in the inner lobby of the Myrtle Beach Convention Center. The inner lobby of the Myrtle Beach Convention Center is a wide hall through which all persons attending functions at the Myrtle Beach Convention Center must pass in order to reach the main auditorium.

On November 7, 1982, Plaintiff displayed an exhibition of his art work in the inner lobby of the Myrtle Beach Convention Center. The exhibition consisted of thirty-one (31) paintings and six (6) sculptures. On the evening of November 7, 1982, Jane Charles, then president of the Waccamaw Arts and Crafts Guild, approached the Plaintiff with the request that he remove one of the paintings from his exhibit. The Plaintiff asked that the request be put in writing and Jane Charles gave him the request in

writing that night. The request stated that the Waccamaw Arts and Crafts Guild found the Plaintiff's painting Number 28, "Narcissus," or "Twentieth Century Madonna" offensive and requested that it be removed from the show no later than November 8, 1982.

Plaintiff refused to remove the painting from the art show. Thereafter, negotiations occurred between the Plaintiff and members of the Waccamaw Arts and Crafts Guild and the Plaintiff and Defendant Mack Stone, Director of the Myrtle Beach Convention Center. Plaintiff and members of the Waccamaw Arts and Crafts Guild, as well as Defendants Stone and Smith were unsuccessful in resolving the dispute. Thereafter, Defendant Carey Smith instructed Defendant Mack Stone to close the inner lobby of the convention

center until the matter was resolved.

On November 9, 1982, members of the public were not allowed into the inner lobby of the Myrtle Beach Convention Center except when going to and from events in the convention center auditorium. In other words, the center was not open to the public solely for the purpose of viewing the exhibition of the Plaintiff. In addition, the entire exhibit was screened from the public by cloth partitions.

On November 11, 1982, Plaintiff petitioned the Circuit Court alleging that the Defendants had censored his art exhibition without due process of law. The Petition sought an injunction restraining the Defendants from further interfering with Todd's exhibition, additional exhibition time, and money

damages for lost profits and harm to Todd's reputation and occupation as an artist. On November 22, 1982, the Court heard arguments from both parties, received affidavits from both parties and viewed the painting in question. After hearing the evidence, the court issued a temporary injunction in order to preserve the status quo. The effect of the injunction was that the exhibit of Mike Todd reopened without further interference from members of the Waccamaw Arts and Crafts Guild or the Defendants.

The Plaintiff reopened his exhibition pursuant to the Judge's Order. Thereafter, Plaintiff voluntarily removed his exhibit from the convention center because the inner lobby was used as a display area for a previously scheduled blue grass music convention and Plaintiff

did not feel his exhibit was properly protected.

STATEMENT OF ISSUES

1. Defendant City of Myrtle Beach has moved for a summary judgment on the basis that there is no evidence that the decision to close the inner lobby housing the art exhibit of the Plaintiff was made on the basis of a policy or custom of the City. Under 42 U.S.C. 1983 the case law indicates that a municipality cannot be held liable for the acts of its employees unless those employees were acting pursuant to a custom or policy promulgated by the City.

2. The Defendants Carey Smith and Mack Stone moved for summary judgment on the basis that their decision to close the inner lobby of the Myrtle Beach Convention Center did not violate the civil rights of

the Plaintiff as secured by the First and Fourteenth Amendments of the U. S. Constitution.

3. Defendants Carey Smith and Mack Stone moved from summary judgment on the additional ground that even if their acts violated the civil rights of the Plaintiff, they are immune from suit by virtue of the immunity provided them in the case laws which have grown out of the claims made under 42 U.S.C. 1983.

4. Plaintiff has moved for summary judgment on the grounds that the Order of Judge Floyd is res judicata as to the issues of liability. Defendants oppose Plaintiff's claim for res judicata by virtue of the fact that the Order of Judge Floyd is not a final order, but a temporary injunction. Further, Judge Floyd's Order does not address the

defenses raised by the Defendants.

DISCUSSION

A. The City of Myrtle Beach.

Actions against municipal defendants under Section 1983 were authorized by the landmark decision of the Supreme Court in Monell v. Dept. of Social Services, 436 U.S. 658 (1978). In Monel, the court held that when a municipal policy of some nature is the cause of unconstitutional actions taken by municipal employees, the municipality itself will be liable. Liability will exist where the constitutional action "implements or executes a policy, statement, ordinance, regulation or decision officially adopted and promulgated by municipal officers, or where the constitutional deprivation is visited pursuant to governmental custom

even though such a custom has not received formal approval." The court defined "custom" with reference to Adickes v. S. H. Kress and Co., 398 U. S. 144 (1970), as "persistent in wide spread discriminatory practices of officials." A policy or custom need not be made by the city's lawmakers, but can be set by those whose edicts which may fairly be said to represent official policy.

In the present case, the City of Myrtle Beach has elected to adopt the council/manager form of government. In the council/manager form of city government all legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote. Section 5-13-30, Code of Laws of South Carolina,

1976. Under the form of government adopted by the City of Myrtle Beach, the city manager and the director of the Myrtle Beach Convention Center do not have the authority to set city policy, nor can their acts be said to represent official policy in view of legislative authority granted to the municipal council.

The acts of Defendants Carey Smith and Mack Stone were individual discretionary acts, involving a decision on how to handle a situation which has arisen in the Myrtle Beach Convention Center only once in the entire history of Myrtle Beach. The municipal council never met, nor did they vote, on the decision made by Defendants Smith and Stone. For that reason, the acts of Defendants Smith and Stone cannot be translated as the acts of the city council or the City of Myrtle

Beach. The city council does not have the authority to delegate matters of policy of customs, and in this instance it did not delegate that authority to Carey Smith or Mack Stone, therefore the individual decisions of Defendants Smith and Stone do not give rise to liability for the City of Myrtle Beach under 42 U.S., Section 1983. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

B. Defendants Carey Smith and Mack Stone.

The claims of the Plaintiff are not rare in the art world. However, only three cases have been found which resemble the fact situation present in this case. In Close v. Lederle, 424 F2d 1988 (1st Cir. 1970), an art instructor at a state university, after being invited to exhibit his paintings in a busy corridor was made

to remove them because they were sexually explicit; the First Circuit found no violation of the First Amendment in the removal of the art instructor's paintings. Applegate v. Dumke, 25 Calif. App. 3rd 304, 101 Cal. Rep. 645 (1972) has similar facts, but the court ruled on the grounds of waiver as opposed to whether the First Amendment rights of the Plaintiff were violated.

In Piarowski v. Ill. Community College, 759 F.2d 525 (1985), the chairman of the the art department brought a 1983 action against a junior college and various officials, claiming violation of his First Amendment rights by reason of demands that he relocate certain of his art work to an alternative site on campus. The Court of Appeals held that the college officials did not violate the First

Amendment rights of the chairman of the art department when they requested him to move his works from a heavily traveled campus mall to an alternative site.

In analyzing the issues the Court must consider the nature and quality of the Plaintiff's constitutional interests. Plaintiff claims that art if fully protected by the Constitution as political or social speech. White it is true that in the course of holding a motion picture entitled "The First Amendment Protection" the court in Burstyn, Inc. v. Wilson, 343 U.S. 495, held that moving pictures affect public attitudes in ways "ranging from direct espousal of political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." However, this statement in itself recognizes that there are degrees

of speech. The extent or protection afforded by the First Amendment depends upon the subject matter. See New York Times v. Sullivan, 376 U.S. 254, 84 Sup. Ct. 710. Roth v. U. S., 354 U. S. 476 77 Sup. Ct. 1304 (1957).

The question is what is the extent of the Plaintiff's constitutional interest in expression. The courts have traditionally placed a much greater importance on communications that express a political or social thought. Cases dealing with students' rights to hear possibly unpopular speakers involve a medium and subject matter entitled to greater protection than Plaintiff's art. Close v. Lederle, 424 F.2d 988 (1970). In Close, the court found the art exhibitor's constitutional interests minimal.

The next step of the analysis is to

turn to the question of whether Defendants have demonstrated a sufficient counter interest to justify their action. In Close, the corridor was a passageway regularly used by the public, including children. The court found that the Defendants were entitled to consider the primary use to which the corridor was used. The court further found that the Defendants were warranted in finding that the exhibit was inappropriate to the use proposed by the art exhibitor. It held that where there was, in effect, a captive audience and the Defendants had a right to afford protection against "assault upon individual privacy." See Redrup v. N.Y., 386 U.S. 767, 87 Sup. Ct. 1414 (1967).

In the present case, the Defendants were faced with a similar situation where the inner lobby was the only means of

getting to and from the main convention auditorium. In addition, shows such as the Myrtle Beach Beauty Pageant were scheduled to take place in the convention center's auditorium. Children, also, were using the inner lobby to go back and forth to the shows. Just as the Defendants in Close were entitled to consider the primary use for which the corridor was intended, Defendants Smith and Stone were also entitled to consider the primary use to which the inner lobby was intended. In other words, the inner lobby was not solely or even primarily to be used as an art gallery for the public. The inner lobby was a means of getting to and from the auditorium of the Myrtle Beach Convention Center.

The Plaintiff cites several cases which talk about the rules for instituting

a system of prior restraint over expressions of art. Those cases do not apply to the present situation. The Defendants in the present case were not instituting a system of prior restraint over future art exhibits. The Defendants in the present case were faced with a painting which they were informed and believed was offensive and even obscene. The Defendants had received a request from the licensee granted permission to use the space to have the painting removed from the exhibit. Due to the complaints of the Waccamaw Arts and Crafts Guild, and due to Defendant's own sensibility as to what was appropriate for the inner lobby, Defendants had the right to close the Plaintiff's exhibit if he refused to remove the offensive painting. Close v. Lederle, 424 F.2d 988 (1970).

Even if the Defendants did not have the right to close the Plaintiff's exhibit, they are entitled to summary judgment on the grounds that they are immune from suit by virtue of the immunity provided by 42 U.S.C. Section 1983. The leading decision on the question of qualified immunity is Harlow v. Fitzgerald, 457 U.S. 800 (1982). In Harlow, the court held "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In other words, an official, under the test, is shielded from liability for violating established statutory or constitutional rights that are not clearly

established.

The cases of Piarowski v. Ill. Community College, 759 F.2d 626 (1985), and Close v. Lederle, 424 F.2d 988 (1970), are strong indications that the law concerning the civil rights of the Plaintiff is not clearly established. As the court indicated in Piarowski, only three cases in the country have been found as of 1985 which resemble the factual situation which faced the Defendants. In at least two of those factual situations the court held that the actions of the defendants were permissible. Both Piarowski and Close were appealed to the United States Supreme Court on writs of certiorari, however, those writs of certiorari were denied. The rights of the Plaintiff to exhibit his works and the rights of the Defendants to protect a

"captive audience" from an invasion of privary are issues that are not clearly established in the law.

The acts of both Defendants Stone and Smith were discretionary in that they attempted to negotiate solutions with the Plaintiff, but no other solutions were acceptable to all parties.

In Harlow v. Fitzgerald, supra, the court indicated that the test of whether the law is clearly established is an objective question which the court can determine on motions for summary judgment. Defendants assert that they are entitled to summary judgment under the present case by virtue of immunity afforded them under U.S.C. 1983. Therefore, summary judgment is appropriate for Defendants Smith and Stone.

C. Plaintiff's Motion for Summary

Judgement

Plaintiff's motion for summary judgment rests, in part, on the Temporary Restraining Order of Judge Sidney T. Floyd dated November 22, 1982. Plaintiff claims that Judge Floyd's order preserving the status quo is res judicata on the issue of liability for the present Defendants. Plaintiff's claim is incorrect.

One of the essential elements of res judicata is that a final determination of the parties' rights be made by the Court. Wessinger v. Rouche, 228 S.C. 157, 341 S.E. 2d 643 (1986). Judge Floyd makes the point in his own Order that the injunction's purpose was to protect the Plaintiff as to some right he might lose before the matter could be heard on its merits. He stated that a temporary injunction is for the preservation of the

status quo, and thus avoid possible irreparable injury to the Plaintiff's pending litigation.

Judge Floyd's Order does not address the issue on whether Plaintiff was entitled to costs and damages in the form of lost profits. Another element of res judicata is that the issues be judicially determined. Although damages were requested in Plaintiff's claim, Judge Floyd did not award them. Defendants could possibly argue that Judge Floyd's Order was res judicata and no damages occurred if the Order is a final determination of all issues.

As shown in the cases of Piarowski v. Ill. Community College, 759 F.2d 625 (1985), and Close v. Lederle, 424 F.2d 988 (1st Cir. 1970), Judge Floyd and Plaintiff have incorrectly characterized the actions

of Defendants as instituting a system of prior restraint. Their analysis is incorrect because the painting was exhibited and Defendants acted after they had viewed the painting and received complaints from the Waccamaw Arts and Crafts Guild. The actions of Defendants Smith and Stone pertained only the the exhibit of the Plaintiff.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be denied and Defendant's Motion for Summary Judgment should be granted.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
James E. Moore, Judge of the
Court of Common Pleas

Mike Todd, ... Appellant,

v.

Carey Smith, individually and in his official capacity as former City Manager of the City of Myrtle Beach, South Carolina; Mack Stone, individually and in his official capacity as former Director of the Myrtle Beach Convention Center; and the City of Myrtle Beach, South Carolina, a municipal corporation, ... Respondents.

PETITION FOR REHEARING

Appellant moves this court to grant him a rehearing regarding footnote #1 in the Supreme Court's opinion. Todd v.

Smith, No. 23452, slip op. 35, 36 n.1 (S. C. August 5, 1991). Appellant seeks this rehearing because the court's description of the painting, specifically the portion of the description which states that the woman's other hand is "apparently fondling herself", Id. at 36 n.1, makes a conclusion of fact that has not been agreed upon by the parties. The statement of facts contained in the Transcript of Record states only that "Plaintiff alleges Defendants closed his exhibit after receiving complaints that one of his portraits displayed a masturbating woman." (Tr., p. 2, 11. 8-10).

The artist ardently disputes that the painting is of a woman masturbating or "apparently fondling herself," and this finding of fact, contained in footnote #1, if left unchanged, could possibly

prejudice appellant's further appellate rights. At the very least, the footnote should read:

> The Defendants contend that this painting is of a nude woman with one hand on her right breast and the other hand apparently fondling herself, although this description is disputed by the artist.

Wherefore, having set forth grounds therefor, the Appellant moves this court to grant him a rehearing regarding the Court's description of the art work in the opinion of August 5, 1991.

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August 20, , 1991

EXCERPTS FROM TODD V. SMITH
TRANSCRIPT OF RECORD

Q First of all, when did you first become aware that Mike was exhibiting some of his work there in the museum -- I'm sorry, in the Convention Center?

A I think it was on that Monday that I was asked by a council member to go over and look at the exhibit.

Q Was that Marjorie Stonebrook?

A Yes.

Record at 90, 1.24 to 91, 1.7 (Deposition of Carey Smith).

Q Tell me what -- you said you went over at the request of a council member, and I asked if it was Ms. Stonebrook, and you said yes. Did she call you, Ms. Stonebrook, call you that morning?

A Yes.

Q Or did she call you that night

before?

A No, she called me that morning.

Q What did she tell you when she called you?

A Just that there was an exhibit up, and that certain of the paintings, she felt, were not appropriate for the Convention Center, and that she wanted me to go by and look at it; that some of the members of the Guild were upset about it, and she basically wanted me to go by and look at it.

Q Did she express a concern about more than one piece of art that was in that exhibit, or was it just one particular piece of art that she was worried about?

A I think she mentioned the one particular painting. She didn't go into a great deal of detail about the work, as I

recall, other than the fact that she felt it was not suitable for showing there in the lobby area of the Convention Center. So I told her that I would go by and look at it.

Record at 91, l.4 to 92, l.12 (Deposition of Carey Smith).

Q As a matter of fact, the exhibit was closed and locked up, was it not, so folks could not get in there to look at it?

A The doors were closed and locked, yes, sir, that's right.

Record at 116, l1.5 - 9 (Deposition of Carey Smith).

Q Was this decision made by you and Mr. Stone?

A Yes.

Q Or was it a decision made by you?

A Well, Mr. Stone worked for me.

Q Was he carrying out your order to close it down, or did he take this action on his own, is really was I'm asking?

A No, he wouldn't take an action like that on his own.

Q So this decision was made by you? He was carrying out your order to close down the show?

A Yes.

Q Did you clear this with the Mayor?

A No.

Q Mayor Ficken?

A No.

Q Did you clear this with the city?

A Well, what do you mean by "clear?"

Q Well, did you ask them for their input and their thoughts on what should be done?

A Yes.

Q And who did you talk to?

A I did discuss it with them in general terms. Of course, by that time, there was a lot of publicity in the newspapers and the radio and the television and that sort of thing. So they were generally aware of what had happened. We basically, my recollection is, talked to them individually and told them what we were going to do, what we thought was best to do in the situation.

Q Did they concur with that?

A No one really said -- and, of course, the council would have had to have acted as a body to have told me, you know, "Don't do this." And if they had done

that as a body, then I would not have done it. But they did not give me any such instructions.

Q Did you talk with Mayor Ficken?

A I'm sure that I did, yes.

Q He concurred that it should be removed or closed down?

A I don't recollect, you know, his specific reaction. What I do recollect, though, is that I was not given any instruction. The council was aware of what we were going to do and we were not given any instruction to the contrary as to not to do what we planned.

Record at 118, l.21 to 120, l.18 (Deposition of Carey Smith).

It appears that the plaintiff, Mike Todd, had received an invitation to exhibit his works and that the defendants, one or more, has themselves decided that

the picture, "Narcissus", was obscene without just procedure. A temporary restraining order is appropriate.

Record at 15, 11.22 - 26 (Temporary Restraining Order of Judge Sydney T. Floyd of November 22, 1982).

The acts alleged herein were committed on behalf of the Defendant City of Myrtle Beach by its representatives, officers and employees, under the color and pretense of the statutes, ordinances, regulations, customs and usages of the City of Myrtle Beach, and the State of South Carolina; that upon being notified of the actions taken by Defendants Smith and Stone, the mayor and city council failed to take any action to correct their unconstitutional actions and, in fact, publicly ratified their conduct.

Record at 7, 1.28 to 8, 1.8 (Plaintiff's Complaint).